

An partnership that owns and operates a coal mine is not subject to Retailers' Occupation Tax on coal that is used in that same partnership's electric generating facility because the coal will be conveyed from the mine to the electric generating facility without any sale at retail taking place. See 86 Ill. Adm. Code 130.101. (This is a PLR.)

May 1, 2007

Dear Xxxxx:

This letter is in response to your letter dated February 1, 2007 (superseding your letter dated June 1, 2006), in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANIES for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither COMPANIES nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

On behalf of our clients, ABC (the 'Company') and the tenant-in-common group defined below, we respectfully request the Illinois Department of Revenue to issue a Private Letter Ruling pursuant to 2 Ill. Adm. Code 1200.110 with respect to the following factual situation.

The tenant-in-common group includes Midwest not-for-profit electric cooperatives, for-profit generators of electricity, and municipal joint action agencies (collectively, the 'GROUP'). Each member of the GROUP is actively engaged in the generation of electricity. The GROUP is developing an electric generating facility and coal mine located in COUNTY Illinois. The GROUP currently includes COMPANIES. For U.S. income tax purposes, this ownership group will elect not to be treated as a partnership. We respectfully request this private letter ruling on behalf of the Company and each entity in the GROUP.

General Information

1. Enclosed please find an original Form IL-2848, Power of Attorney, authorizing FIRM to represent the Company and each entity in the GROUP before the Illinois Department of Revenue (the 'Department').
2. This Private Letter Ruling ('PLR') is not requested with regard to hypothetical or alternative proposed transactions. This PLR is requested to determine the Retailers' Occupation Tax consequences of the actual business practices of the Company and the GROUP.
3. Neither the Company nor any member of the GROUP is currently engaged in litigation with the Department in regard to this or any other tax matter.
4. Neither the Company nor any member of the GROUP is currently under audit by the Department in regard to this or any other tax matter.
5. To the best knowledge of the Company's and the GROUP's personnel, the Department has not previously ruled regarding this matter for the Company or the GROUP. In addition, neither the Company nor the GROUP has submitted the same or similar issue to the Department.
6. The Company and the GROUP request that certain information be deleted from the PLR prior to dissemination to others. The Company and GROUP request that their respective names, addresses, location of the facility, the description of the facility [including reference to the plant's megawatt(s) and sources of water], and the name of its representative be deleted.
7. Neither the Company nor the GROUP is aware of no [sic] authority contrary to the authorities referred to and cited below.

Statement of Material Facts

1. CORPORATION and/or its affiliates and subsidiaries (collectively 'CORPORATION') purchased mineral rights from several Illinois landowners (the 'Coal Rights'). The Coal Rights are real property interests conveyed by deed to CORPORATION. These purchases of real property were not subject to Illinois Retailer's Occupation Tax or Use Tax.
2. CORPORATION has provided the landowners with full payment for its purchases of their mineral rights (to coal underground). The majority of these land owners will receive no further payment of any kind from CORPORATION, the Company or the GROUP when coal is mined from underneath the land owners' surface rights. However, some of these landowners may receive additional royalty payments from the GROUP when coal is mined from underneath the landowners' real property.
3. Pursuant to the Asset Purchase Agreement, CORPORATION has or will convey by deed for consideration all of CORPORATION's right, title and interest in and to the Coal Rights to the GROUP as 'tenants in common.' This is a transfer of all property rights, and therefore not subject to Illinois Retailer's Occupation or Use Tax. Each GROUP member will therefore own an undivided fractional interest in

all of the Coal Rights. Each GROUP member has or will be a party to a Participation Agreement, which will define their respective rights, obligations and liabilities.

4. The GROUP will develop and construct an underground coal mine and electric power plant. The coal will be mined, conveyed directly to the power plant, and used as fuel to generate electricity. The mine's annual coal production capacity will be approximately #M tons per year. The business model for this operating entity is a mine-mouth power plant.
5. The Participation Agreement will require each GROUP member to contribute their respective allocated share of the Coal Rights to the GROUP for use as fuel in the power plant to generate electricity.
6. The Company will establish a wholly-owned subsidiary (XYZ) that will mine the coal and convey it to the power plant. Pursuant to the Participation Agreement, the GROUP will reimburse XYZ, through the Company, for the costs incurred to mine the coal and convey the coal to the power plant. However, XYZ will never hold ownership of the Coal Rights or the physical coal itself and, accordingly, no consideration will be paid to XYZ for the Coal Rights or the physical coal itself.
7. The Company will establish a wholly-owned subsidiary (PLANT) that will operate the power plant. Pursuant to the Participation Agreement, the GROUP will reimburse PLANT, through the Company, for the costs incurred to operate the plant. However, PLANT will never hold ownership of the Coal Rights or the physical coal itself and, accordingly, no consideration will be paid to PLANT for the Coal Rights or the physical coal itself.
8. The construction of the electricity generating facility and coal mine will begin in late 2006/early 2007.

Ruling Requested

On behalf of the Company and the GROUP, we respectfully request the Illinois Department of Revenue to rule that GROUP's mining of coal from its Coal Rights and their respective use of such mined coal as fuel for generating electricity will not be subject to Illinois Retailer's Occupation Tax of [sic] Illinois Use Tax ('Sales and Use Tax').

Relevant Authorities

Illinois imposes a Use Tax on the privilege of using in Illinois tangible personal property purchased at retail from a retailer. The tax is applied against the selling price or fair market value of the tangible personal property used within Illinois. 35 ILCS 105/3; 35 ILCS 105/3-10. Purchase at retail is defined as 'the acquisition of the ownership of, or title to, tangible personal property through a sale at retail,' and a sale at retail is defined as 'any transfer of ownership of or title to tangible personal property to a purchaser for the purpose of use or consumption....for consideration... 86 Ill. Adm.Code 130.201(a); 86 Ill. Adm.Code 150.201(a).

Illinois has not defined 'tangible personal property' in its statutes or regulations. However, Illinois courts have generally understood tangible personal property to mean

all material things with intrinsic value except real property such as land, buildings, and attached fixtures, or intangibles such as stocks, bonds, cash, copyrights and licenses. Farrand Coal Company v. Halpin, 10 Ill.2d 507, 140 N.E.2d 698 (1957); Administrative Hearing Decision No. UT 02-2, The Department of Revenue of the State of Illinois v. John Doe, April 30, 2002.

In Illinois, the ownership of mineral rights is an ownership of real property. Jilek v. Chicago Wilmington & Franklin Coal Co., 382 Ill. 241, 47 N.E.2d 96 (1943); Pawnee Oil & Gas Inc. v. County of Wayne, 323 Ill.App.3d 426, 751 N.E.2d 1268, 256 Ill.Dec. 431 (2001). Therefore, the ownership of mineral rights is not an ownership of tangible personal property.

In this instance, the GROUP will accept ownership of real property in the form of the Coal Rights conveyed from CORPORATION for consideration by deed as tenants in common, and thereafter the GROUP will mine the coal from these Coals [sic] Rights, convey the coal to its own power plant and use the coal to fuel the power plant to generate electricity. At all times, the GROUP will be dealing with the ownership and possession of its own real property, and not any tangible personal property transferred to it from any third party for consideration in any form. Furthermore, the GROUP will not purchase coal at retail from a retailer. Rather, the GROUP will have title to and ownership of the coal before and after the coal is mined from the GROUP's Coal Rights, and therefore, there will be no sale or purchase of coal.

Therefore, because the Illinois Retailer's Occupation Tax and the Illinois Use Tax are only imposed on the transfer or use of tangible personal property that was purchased at retail from a retailer and the coal used by the GROUP was not purchased at retail from a retailer, the GROUP's use of coal as fuel for generating electricity at its electric generating facility will not be subject to Illinois Retailer's Occupation Tax or Illinois Use Tax.

Similar reasoning from the Arizona Department of Revenue

In Arizona Private Taxpayer Ruling LR2001-004 (2001), the taxpayer had constructed a natural gas fired electric generating plant. All of the natural gas used to fuel the Facility was acquired through the taxpayer's ownership of a working interest in natural gas well(s)/reserves(s). Therefore, the taxpayer did not purchase its gas from retailers.

The Arizona Department of Revenue stated that: 'When a person produces gas for their own use there is no transfer of title or possession of tangible personal property for a consideration, hence, there is no sale.... When the taxpayer consumes natural gas that came from wells in which it has a working interest, there has been no use or consumption in this state of tangible personal property that was purchased from a retailer or utility business.... The Department rules that the use tax does not apply to natural gas that is consumed by the taxpayer in its electric generating plant when such gas was withdrawn from out-of-state wells in which it has a working interest.' Arizona Private Taxpayer Ruling LR2001-004 (2001).

Conclusion

We respectfully request that the Department issue a ruling (which is similar to the above ruling that was issued by the Arizona Department of Revenue) stating that the GROUP's mining of coal from its own Coal Rights and the use of that coal as fuel for generating

electricity at its own electric power plant will not be subject to Illinois Retailer's Occupation Tax or Illinois Use Tax for the reasons stated above.

If the Department cannot make such a ruling, we request that the Department contact us to determine what additional information is required or allow the taxpayer to rescind this ruling request.

DEPARTMENT'S RESPONSE:

This letter ruling addresses the issues raised with respect to the "GROUP" which consists of the following members: COMPANIES. When referred to in the Department's response, the GROUP means that group comprised of the members identified here. For purposes of this Letter Ruling, the Department will treat the GROUP as a partnership.

Retailers' Occupation Tax is imposed upon persons engaged in this State in the business of selling at retail tangible personal property at the rate of 6.25%. See 86 Ill. Adm. Code 130.101. A corresponding Use Tax is imposed on purchasers by taxing the use of tangible personal property purchased at retail from retailers. See 86 Ill. Adm. Code 150.101.

The Asset Purchase Agreement you provided at our meeting on January 24, 2007 shows that the "Participants" (who are the members of the GROUP) own the "Project" in the same proportion as their percentage membership in the GROUP. The "Project" is comprised of (i) a coal-fired, steam-electric generating station and (ii) the coal reserves, coal storage handling and conveying equipment, and mine facilities.

Under the Asset Purchase Agreement, the seller agreed to convey to the GROUP, as tenants-in-common, all of its right, title, and interest in and to the coal rights related to the Project. As a preliminary matter, we agree that these purchases of coal rights, as purchases of interest in real property, are not subject to Retailers' Occupation or Use Tax.

Based on your representations and the portions of the Asset Purchase Agreement provided to the Department, the GROUP will not purchase coal at retail from a retailer in undertaking the Project. Rather, the coal used in the GROUP's electric generating facility will be mined from the coal mine owned and operated by the GROUP. And, because the GROUP will have title to and ownership of the coal both before and after it is mined, by virtue of the mineral rights to the coal held by the GROUP, the coal will be conveyed from the mine to the electric generating facility without any exchange of consideration.

Since there is no sale of the coal, and since the Use Tax is limited to items purchased at retail from a retailer, it is the Department's position that there is no Retailers' Occupation or Use Tax on the coal mined from the GROUP's mine and used in the GROUP's electric generating facility as described in this letter request and the additional materials provided.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules, or the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.]

Sincerely,

Samuel J. Moore
Associate Counsel

SJM:msk